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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JAMES KIRKLAND BATSON,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Writ Of Certiorari To
The Supreme Court Of Kentucky

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE

STATEMENT OF INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law was organized in 1963, at the request of the President of the United States, to involve private attorneys in the national effort to assure the civil rights of all Americans.

During the past 22 years, the Lawyers' Committee and its local affiliates have enlisted the services of thousands of members of the private bar in addressing the legal problems of minorities and the poor. The Committee's membership today includes past presidents of the American Bar Association, a number of law school deans, and many of the nation's leading lawyers. The importance of this case to the principle of equal justice under law, and the widespread perception of minority group members that prosecutors can exercise peremptory challenges in a discriminatory manner, have prompted the Lawyers' Committee to file this brief *amicus curiae* in support of petitioner. The parties have consented to the filing of this brief, which is therefore submitted pursuant to Supreme Court Rule 36.2.

STATEMENT

Petitioner James Kirkland Batson, a black man, was convicted by a Kentucky jury of second degree burglary and receipt of stolen property, based upon his alleged theft of two purses (J.A. 5). He was sentenced to 20 years' imprisonment (J.A. 5).

Although the venire in petitioner's case included four blacks, the Commonwealth used four of its six peremptory challenges to exclude each of them (J.A. 2-3). Petitioner timely objected to this deployment of the Commonwealth's peremptory challenges, moved to discharge the jury panel, and later objected to the swearing of the jury (J.A. 2-4). The trial court overruled petitioner's objections, refused to inquire into the Commonwealth's reasons for striking all of the black veniremen, and refused even to determine whether the record showed a strong likelihood that the

Commonwealth had stricken the black veniremen solely because of their race (J.A. 3).

The Supreme Court of Kentucky affirmed petitioner's conviction (J.A. 9). The Supreme Court rejected petitioner's constitutional claim, based on the Commonwealth's exercise of its peremptory challenges, on the ground that petitioner had not satisfied the standard established by this Court in *Swain v. Alabama*, 380 U.S. 202 (1965) (J.A. 8).

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than 100 years, this Court has consistently held that the Equal Protection Clause of the Fourteenth Amendment precludes the exclusion of blacks, based solely on their race, from service on grand and petit juries. *See, e.g., Peters v. Kiff*, 407 U.S. 493 (1972); *Alexander v. Louisiana*, 405 U.S. 625 (1972); *Avery v. Georgia*, 345 U.S. 559 (1953); *Strauder v. West Virginia*, 100 U.S. 303 (1880).

In *Swain v. Alabama*, 380 U.S. 202 (1965), this Court noted the "unquestioned" soundness of that principle (*id.* at 205) and reaffirmed that " '[j]urymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race' " (*id.* at 204, *quoting Cassell v. Texas*, 339 U.S. 282, 286 (1950)). Thus, as the Court held in *Swain*, "a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause" (380 U.S. at 203-04). Based, however, on

the perceived need to balance an individual's Fourteenth Amendment rights against the state's traditional discretion in exercising peremptory challenges, the Court also held that a criminal defendant could not establish a violation of the Fourteenth Amendment by proving that the state had practiced such discrimination in his individual case (*id.* at 221-22). In *Swain*, the Court held that a defendant could establish a violation of the Equal Protection Clause in this context only by proving that the state had a longstanding, systematic practice of deploying peremptory challenges to exclude members of particular racial groups from jury service (*id.* at 223-24).

Insofar as it creates a virtually irrebuttable presumption in favor of the state's exercise of peremptory challenges and limits the kind of proof which may be adduced to establish a constitutional violation in this context, the Court's holding in *Swain* is doctrinally unsound and must be overruled for at least three separate reasons. First, *Swain* is inconsistent with this Court's more recent decisions under the Sixth Amendment. In 1968, three years after *Swain* was decided, this Court held for the first time that the Sixth Amendment requirement of trial by an impartial jury applies to state prosecutions. *Duncan v. Louisiana*, 391 U.S. 145 (1968). Under the Sixth Amendment, as the Court later held in *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975), a criminal defendant is entitled to be tried by "a jury drawn from a fair cross section of the community." To withstand Sixth Amendment scrutiny, as the *Taylor* Court observed, the exclusion of a distinctive class from that cross-section must be justified by "weightier reasons" than the "merely rational grounds" sufficient to satisfy the equal protection standard (*id.* at 534). *Compare Taylor v. Louisiana*, 419 U.S. 522 (1975), *with Hoyt v. Florida*, 368 U.S. 57 (1961). Thus,

even if the *Swain* Court was correct in holding that the use of peremptory challenges to practice racial discrimination in an individual case does not violate the Equal Protection Clause of the Fourteenth Amendment, the same conduct clearly deprives a criminal defendant of his Sixth Amendment right to be tried by a jury drawn from a fair cross-section of the community.

Second, the equal protection analysis articulated in *Swain* is doctrinally unsound and inconsistent with this Court's more recent cases under the Fourteenth Amendment. The distinction posited in *Swain*—between systematic and individual discrimination—is analytically unsound because it confuses the separate and distinct questions of what constitutes a constitutional violation and how such a violation may be proved. Proof that discrimination has occurred in previous cases may indeed be probative of present discrimination, but the existence of present discrimination cannot be determined by reference only to historical practice. Because the right to be tried by an impartial jury is a personal right, a defendant is entitled to constitutional protection of that right even if the state has not previously denied it to others. *See, e.g., Alexander v. Louisiana*, 405 U.S. 625, 628-29 (1972).

Finally, the *Swain* Court erred in finding that respect for the historical nature of peremptory challenges precluded any inquiry into the racially discriminatory exercise of those challenges in an individual case. The balance struck by the Court in *Swain*, which elevates the goal of preserving the absolute discretion traditionally embodied in the peremptory challenge (without possibility of even the most minor alteration), in preference to the protection of individual constitutional rights, conflicts with the Court's more recent decisions in analogous areas involving similarly competing values. *See Mt. Healthy City*

School District Board of Education v. Doyle, 429 U.S. 274 (1977); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). A balance more consistent with this Court's recent cases was struck by the California Supreme Court in *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748 (1978). In *Wheeler*, the court held that where a defendant has established a *prima facie* case of discrimination in the use of peremptory challenges in an individual case, the state must show that the challenges were based on grounds reasonably relevant to the particular case, rather than on group bias. Only if the state's explanation is pretextual will the trial court dismiss the jurors already selected and begin the process anew. The *Wheeler* rule gives adequate protection both to the prosecutor's discretion and to individual constitutional rights; it is the logical and constitutionally mandated culmination of constitutional developments since *Swain*.

ARGUMENT

I.

THE USE OF PEREMPTORY CHALLENGES TO EXCLUDE MEMBERS OF A RACIAL GROUP FROM JURY SERVICE IN AN INDIVIDUAL CASE VIOLATES BOTH THE SIXTH AND FOURTEENTH AMENDMENTS.

In the 20 years since the Court decided *Swain v. Alabama*, 380 U.S. 202 (1965), the Court has consistently held that the Sixth Amendment applies to state as well as federal prosecutions. Thus, a state criminal defendant is constitutionally guaranteed the right to trial by an impartial jury of his peers drawn from a fair cross-section of the community. The use of peremptory challenges to exclude an identifiable class from jury service irreconcilably conflicts with that individual right. In addition, the law relating to racial discrimination has developed greatly in the past twenty years. Since *Swain*, this Court has consistently held that the Equal Protection Clause of the Fourteenth Amendment prohibits race-based discrimination against individuals; an individual's entitlement to relief cannot depend upon whether he stands first or last in a line of victims. Developments in both of these areas have eviscerated the doctrinal underpinnings of the rule announced in *Swain*.

A. The Use of Peremptory Challenges to Exclude Members of a Racial Group from Jury Service Violates the Sixth Amendment.

In 1968, three years after the Court's decision in *Swain*, the Court held that the Sixth Amendment requirement of trial by an impartial jury applies to state criminal prosecutions. *Duncan v. Louisiana*, 391 U.S. 145 (1968). The

Sixth Amendment right to trial by an impartial jury "contemplates a jury drawn from a fair cross section of the community." *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975). *See Williams v. Florida*, 399 U.S. 78, 100 (1970). In *Taylor v. Louisiana*, this Court recognized that the "fair-cross-section requirement [is not only] fundamental to the jury trial guaranteed by the Sixth Amendment," but mandated by the basic purpose of the jury, which is "to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge" (419 U.S. at 530). *See also Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968).

The Court in *Taylor* also recognized that the Sixth Amendment right to a jury drawn from a representative cross-section of the community imposes restrictions on the exclusion of members of identifiable groups from jury participation, which are more stringent than those applicable under the equal protection standard articulated in *Swain*. Thus, the Court invalidated on Sixth Amendment grounds the conviction of a male defendant who had been tried by a jury selected from a venire from which most women had been excluded by statute. Just 14 years earlier, in *Hoyt v. Florida*, 368 U.S. 57 (1961), this Court had upheld a virtually identical statutory provision against an attack brought on due process and equal protection grounds, although, as Justice Rehnquist noted in *Taylor*, the earlier case presented "circumstances which were much more suggestive of possible bias and prejudice" (419 U.S. at 539 (Rehnquist, J., dissenting)). The Louisiana statute violated the Sixth Amendment because, as the *Taylor* Court explained, "[r]estricting jury service to only special groups or excluding identifiable segments playing major

roles in the community cannot be squared with the constitutional concept of jury trial" (419 U.S. at 530). The central principle was stated, albeit in a different context, almost 40 years ago: "Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class discriminations which are abhorrent to the democratic ideals of trial by jury." *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946). *See also Carter v. Jury Commission*, 396 U.S. 320, 330 (1970) (exclusions based on class or race "contravene[ ] the very idea of a jury—'a body truly representative of the community' ").

The Court has applied the more exacting standard of the Sixth Amendment, not only in the context of venire composition, but also with respect to actions affecting the jury selection process where the venire itself is deemed acceptable. In *Ballew v. Georgia*, 435 U.S. 223 (1978), the Court held that the Sixth Amendment prohibits the use of a five-person petit jury in a criminal misdemeanor trial. There was no suggestion in *Ballew* of an improper venire; nor was there any suggestion that the venire did not contain a fair cross-section of the community.[1] Similarly, in *Witherspoon v. Illinois*, 391 U.S. 510, 518 (1968), the Court held that a petit jury selected pursuant to a state law allowing the disqualification of veniremen opposed to the death penalty lacked "the impartiality to which the

[1] Although there was no majority opinion, six Justices found the jury system defective. Justice Blackmun, joined by Justice Stevens, noted that the size of the jury hindered achievement of the goal of the jury to "truly represent[ ] their communities" (435 U.S. at 239). Justice White concurred on the ground that a jury of less than six failed to satisfy the "fair cross-section requirement of the Sixth and Fourteenth Amendments" (435 U.S. at 245). Justice Powell, joined by the Chief Justice and Justice Rehnquist, noted that the jury size raised "grave questions of fairness" (435 U.S. at 245).

petitioner was entitled under the Sixth and Fourteenth Amendments." *See also Adams v. Texas*, 448 U.S. 38 (1980); *Davis v. Georgia*, 429 U.S. 122 (1976) (per curiam).

If the rights secured by the Constitution are to be effectively safeguarded, the exacting standard established by the Sixth Amendment must be applied to every stage of jury selection. Even in the face of this Court's decision in *Swain*, several state and federal courts have now concluded that the peremptory challenge cannot be used categorically to exclude members of racial groups from service as jurors in an individual case because that practice "restrict[s] unreasonably the possibility that the petit jury will comprise a fair cross section of the community." *McCray v. Abrams*, 750 F.2d 1113, 1129 (2d Cir. 1984), *petition for cert. filed*, No. 84-1426 (March 4, 1985). *See also* pages 18-20, *infra*. Indeed, the constitutional guarantee of an impartial jury, chosen from a fair cross-section of the community, would be illusory if the state were given a free hand to use peremptory challenges to bar blacks at the threshold to the jury box, and thus achieve the very same discrimination prohibited at all earlier stages of the jury selection process. Invidious discrimination is no less unconstitutional because it occurs at the eleventh hour. Regardless of when it occurs, the result is the same: a jury chosen in a manner which precludes even the possibility that it will reflect a fair cross-section of the community. This the Constitution does not permit, both because of the appearance of bias and because of the increased risk of actual bias in the decision of a particular case. *See Peters v. Kiff*, 407 U.S. 493, 502 (1972).[2]

[2] Many social scientists have documented both the tendency of prosecutors to exclude blacks from juries and the pro-prosecution effect such exclusions may have on a verdict, especially where the

(Footnote continued on following page)

The deployment of peremptory challenges to practice racial discrimination in a particular case cannot be tolerated because it violates the individual defendant's right to be free from official discrimination. The peremptory challenge cannot be deemed sacrosanct because the Sixth Amendment, like the Fifteenth, prohibits "sophisticated as well as simple-minded modes of discrimination." *Lane v. Wilson*, 307 U.S. 268, 275 (1939) (Frankfurter, J.).

B. The Use of Peremptory Challenges to Exclude Members of a Racial Group from Jury Service Violates the Equal Protection Clause of the Fourteenth Amendment.

Although the *Swain* Court reaffirmed the principle that racial discrimination can play no role in jury selection (380 U.S. at 204-05), the Court's holding—that an equal protection violation may be proved only through evidence of a long-standing and systematic pattern of discrimination—marks the case as an aberration in an otherwise unbroken line of jury selection cases that stretches back for more than 100 years of our history. In addition, the Fourteenth Amendment analysis articulated in *Swain* conflicts with this Court's more recent decisions under the Fourteenth Amendment. By focusing entirely on proof of systematic discrimination, the Court in *Swain* lost sight of the central meaning of the Equal Protection Clause: that every defendant is *individually* entitled "to require that the State not deliberately and systematically deny to members of his race the right to participate as jurors in

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[2] *continued*
government's evidence is relatively weak and the defendant is black. Based in part upon such empirical evidence, many legal commentators have taken the position that the *Swain* rule affords inadequate protection to individual constitutional rights, and they have therefore advocated adoption of the *Wheeler* rule. The most important of those commentaries are catalogued in Appendix A, *infra*.

the administration of justice." *Alexander v. Louisiana*, 405 U.S. 625, 628-29 (1972), *citing Ex parte Virginia*, 100 U.S. 339 (1880), and *Gibson v. Mississippi*, 162 U.S. 565 (1896). *See also Castaneda v. Partida*, 430 U.S. 482 (1977).

The cross-section of the community principle embodied in the Sixth Amendment was first articulated by this Court as a component of equal protection. In a long line of cases, this Court has relied on the cross-section principle in holding that the deliberate exclusion of black potential jurors because of their race, in whatever stage of jury selection, is a violation of equal protection. In *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880), this Court struck down a state statute which barred blacks from jury service, noting that "prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full . . . protection which others enjoy." Thus, the protection of a black defendant "against race or color prejudice" is an individual constitutional right, which is violated by "compelling [him] to submit to a trial . . . by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects" (100 U.S. at 309). *See also Alexander v. Louisiana*, 405 U.S. 625, 630-32 (1972); *Hernandez v. Texas*, 347 U.S. 475, 478-79 (1954); *Avery v. Georgia*, 345 U.S. 559, 561-62 (1953); *Ballard v. United States*, 329 U.S. 187, 195 (1946); *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 221-22 (1946); *Smith v. Texas*, 311 U.S. 128, 130-31 (1940).

More recently, in *Peters v. Kiff*, 407 U.S. 493 (1972), the Court reversed the conviction of a white defendant because blacks had been excluded from jury service. As Justice Marshall explained in a plurality opinion in which he was joined by Justice Douglas and Justice Stewart,

"the exclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases" (*id.* at 503). Similarly, "[w]hen any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable" (*id.*). The exclusion of such a range of human nature and experience "may have unsuspected importance in any case that may be presented" (*id.* at 504). *See also Apodaca v. Oregon*, 406 U.S. 404, 410-11 (1972).

The Court's decision in *Swain* is aberrational insofar as it holds that an equal protection violation may be established in a particular case only through evidence of an historical pattern or practice of discrimination in jury selection. The Court reached this conclusion only after declining to "hold that the striking of Negroes in a particular case is a denial of equal protection of the laws" (380 U.S. at 221). The Court refused to subject a prosecutor's use of peremptory challenges to equal protection scrutiny because the Court believed that doing so "would entail a radical change in the nature and operation of the challenge" (*id.* at 221-22). Because the *Swain* Court felt compelled to preserve the common law peremptory challenge without any alteration, however minor, the Court effectively sacrificed the defendant's individual right to equal protection in the jury selection process, and therefore put in place an unprecedented and unworkable rule of equal protection analysis. Where the protection of individual constitutional rights required accommodation, the Court instead installed the peremptory challenge in a preferred position. For that reason alone, this prong of the *Swain* holding must be overruled.

In the 20 years since *Swain* was decided, experience has demonstrated that its holding is both doctrinally unsound and practically unworkable. *Swain*'s equal protection analysis, which requires proof of an historical pattern of discrimination to establish a violation of equal protection, has been eroded in subsequent decisions of this Court. In *Alexander v. Louisiana*, 405 U.S. 625 (1972), for example, this Court found an equal protection violation in the selection of a particular all-white grand jury, based on: (1) statistical evidence that the percentage of blacks eligible to participate in that grand jury decreased in each succeeding phase of the selection process, and (2) evidence that the state listed each potential grand juror's race on his identification form. The Court concluded that the selection of an all-white grand jury, together with the incorporation in the jury selection process of a mechanism susceptible to discriminatory application, sufficed to establish a *prima facie* equal protection violation, which the state had not rebutted (*id.* at 630-32). *See also Whitus v. Georgia*, 385 U.S. 545 (1967); *Jones v. Georgia*, 389 U.S. 24 (1967). Notably, the Court did not consider whether this jury selection practice was part of an historic or long-term pattern or practice of discrimination, nor did the Court consider any long-term effect which any such practice may have had on the representation of blacks on grand juries in Louisiana.

No less than the grand jury selection process challenged in *Alexander*, the prosecutor's use of peremptory challenges provides "an easy opportunity for racial discrimination" (405 U.S. at 630). Where individual rights have been abridged in a particular case, correction of that wrong logically cannot be made to depend upon proof that the state has previously violated the constitutional rights of others. *Cf. Connecticut v. Teal*, 457 U.S. 440, 445 (1982) ("an employer [cannot] discriminate against some employees

on the basis of race or sex merely because he favorably treats other members of the employees' group"). While evidence of an historical pattern or practice of discrimination may provide relevant and useful proof of discrimination in a particular case, the lack of such evidence cannot establish the absence of a constitutional violation in a particular case. Logically, other competent evidence may also be used to prove discrimination. For example, a prosecutor may admit that his purpose was to exclude blacks from the jury. Alternatively, the prosecutor may offer an explanation which cannot withstand the most minimal scrutiny. He may say, for instance, that his decision to exclude all black veniremen was based on their responses to particularly significant questions, while the record reflects that he never bothered to ask those same questions of the white veniremen whom he did not challenge. Such evidence is no less (and probably more) probative of discrimination in a particular case than is evidence derived by inference from a prior pattern or practice.

Swain's stringent limitation on the type of proof acceptable in demonstrating racial discrimination in this context has erected a practically impenetrable barrier to the protection of this important right. Efforts to prove a pattern of discrimination are necessarily limited by the extent to which relevant facts, such as the race of challenged jurors, have been made a part of the record in prior cases. As Justice Marshall has observed, "[i]t is doubtful that many jurisdictions maintain comprehensive records of peremptory challenges, let alone information regarding the race of those individuals challenged." *McCray v. New York*, 461 U.S. 961, 965-66 n.4 (1983) (Marshall, J., dissenting from denial of certiorari). In most cases, therefore, defense counsel will bear the burden of developing a record concerning the prosecutor's use of peremptory

challenges, often at the price of annoying the trial judge, who will be understandably anxious to commence the trial. There may be little incentive for defense counsel to make such a record in an individual case, however, because that record will not assist the defendant on trial, but only some future defendant, to whom defense counsel owes no duty of loyalty. Indeed, given defense counsel's duty to the defendant on trial, it might well be unethical for him to risk incurring the disapproval of the trial judge by persisting in an unwanted attempt to develop the record. Even in those cases in which evidence, albeit often anecdotal, has been presented, courts have almost uniformly rejected challenges brought under *Swain*. *See McCray v. Abrams*, 750 F.2d 1113, 1120 & n.2 (2d Cir. 1984), *petition for cert. filed*, No. 84-1426 (March 4, 1985). In sum, the requirements of proof established by *Swain*, being virtually unattainable in practice, have eviscerated the constitutional right identified in that case.[3]

By turning back blacks at the threshold of the jury box, the state discriminates not only against black defendants, but also against the black veniremen who are inexplicably barred from fully exercising the rights and duties of citizenship. To excuse blacks, one by one, from the venire, until the only remaining faces are white, with no obvious explanation but for the color of their faces, not only dis-

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[3] As a practical matter, proof of a constitutional violation has been foreclosed by the Court's holding that only proof of an historical practice of similar violations can suffice to overcome the presumption that a prosecutor has used his peremptory challenges for a proper purpose. *See Commonwealth v. Martin*, 461 Pa. 289, 299, 336 A.2d 290, 295 (1975) (Nix, J., dissenting) ("Is justice to sit supinely by and be flaunted in case after case before a remedy is available? Is justice only obtainable after repeated injustices are demonstrated? Is there any justification within the traditions of the Anglo-Saxon legal philosophy that permits the use of a presumption to hide the existence of an obvious fact?").

credits the judicial process, but puts "a brand upon them, affixed by the law; an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880). The imposition of that badge of slavery, within the four walls of a court of law, cannot be tolerated in a society which stands upon the principle that justice may not be rationed according to wealth, race, color or creed.

II.

STATE AND FEDERAL COURTS HAVE DEVELOPED A WORKABLE ALTERNATIVE TO *SWAIN* WHICH PROTECTS THE CONSTITUTIONAL RIGHTS OF CRIMINAL DEFENDANTS AND PRESERVES THE DISCRETION OF PROSECUTORS IN EXERCISING PEREMPTORY CHALLENGES.

In *Swain*, the Court sought to preserve "the peremptory system and the function it serves in a pluralistic society in connection with the institution of the jury trial" (380 U.S. at 222). Recognizing that racial discrimination in jury selection violates individual constitutional rights, the Court in *Swain* nonetheless declined to require any inquiry into the prosecutor's reasons for exercising his peremptory challenges because the Court feared that such a rule would emasculate the peremptory challenge. As a result, the *Swain* Court adopted an equal protection analysis which has proven ineffective and unworkable as well as doctrinally unsound.

Recognizing both the failure of the *Swain* rule and the need for an alternative that would protect both the constitutional rights of individual defendants and the continued efficacy of the peremptory challenge, several state and federal courts have reexamined *Swain* in light of

more recent Sixth Amendment and equal protection cases. In a series of decisions, these courts have adopted a rule which allows the ordinary exercise of peremptory challenges, while also preserving the right of a criminal defendant to challenge the prosecutor's discriminatory use of peremptory challenges in an individual case. The rule articulated by those courts is essential to the protection of individual constitutional rights, does no damage to the use of peremptory challenges, and warrants adoption by this Court.

A. State and Federal Courts Have Developed A Rule Which More Effectively Balances The Competing Concerns Identified In *Swain*.

The appellate courts of five states and two federal circuits have rejected *Swain*, in favor of an alternative rule which protects the right of a criminal defendant to a representative jury, while leaving virtually untouched the traditional discretion of peremptory challenges. The California Supreme Court first proposed this alternative rule in *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748 (1978), to resolve the tension between these competing values in a manner more exacting than that which this Court embraced in *Swain*. Subsequent application of the *Wheeler* rule has confirmed its effectiveness as a workable rule to protect the competing interests involved.

The *Wheeler* court concluded that the racially biased use of peremptory challenges violated the defendant's state law right to a representative jury. In creating a mechanism to protect that right, the court first adopted the precept in *Swain* that the prosecutor is entitled to the presumption that he has exercised his peremptory challenges on constitutionally permissible grounds. The court then held, however, that if a defendant believes that the state has used its peremptory challenges to strike jurors

because of their group membership, he should interpose an immediate objection. To substantiate that objection, the defendant must then prove a *prima facie* case of discrimination by making a complete record of the proceedings, establishing the exclusion of a cognizable group, and showing from the overall circumstances that there was "a *strong likelihood*" that the stricken veniremen were excluded on the basis of group association rather than personal characteristics (22 Cal. 3d at 280-81, 583 P.2d at 764 (emphasis added)).[4]

Only after the trial court has determined the sufficiency of the defendant's *prima facie* case does the burden shift to the state to show the existence of valid reasons for the exercise of its challenges. Such justification need not rise to the level of an objection for cause, of course, and may be based on the totality of the circumstances rather than single, specific traits. Only if the court finds that the prosecution has failed to satisfy this burden of justification will the court dismiss the jury so selected. In all other cases, the jury will be impaneled and the case tried without delay (22 Cal. 3d at 281-82, 583 P.2d at 765).

The *Wheeler* rule strikes a reasonable balance between the prosecutor's interest in the unbridled use of peremptory challenges and the defendant's constitutional right to a jury selected from a fair cross-section of the community. By requiring the defendant to make both a con-

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[4] Without exhausting the ways in which such a showing may be made, the *Wheeler* court described types of evidence which may support a showing of the discriminatory use of peremptories. The objecting party may show that all or most of a particular group has been challenged; that the challenged jurors share only their group affiliation, while differing in all other respects; that the party has failed to engage in any voir dire before exercising his challenges; and that the challenged jurors share a group affiliation with the defendant, and differ from the victim (22 Cal. 3d at 280-81, 583 P.2d at 764).

temporaneous objection to the use of peremptory challenges and a showing of a strong likelihood of discrimination, the rule preserves the prosecutor's broad discretion in exercising peremptory challenges in all but the most extraordinary case. Recognizing the effectiveness of the *Wheeler* rule, the courts of Massachusetts, New Mexico, Florida, and New Jersey have recently adopted it. *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979); *State v. Crespin*, 94 N.M. 486, 612 P.2d 716 (Ct. App. 1980); *State v. Neil*, 457 So. 2d 481 (Fla. 1984); *State v. Gilmore*, 199 N.J. Super. 389, 489 A.2d 1175 (Super. Ct. App. Div. 1985).[5] In addition, two federal courts of appeals have also adopted the *Wheeler* rule. The Second Circuit adopted the rule under the Sixth Amendment in *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984), *petition for cert. filed*, No. 84-1426 (March 4, 1985), while the Fifth Circuit, in *United States v. Leslie*, 759 F.2d 366, *reh'g en banc granted*, 759 F.2d 366 (5th Cir. 1985), recently adopted the rule pursuant to its supervisory power over federal prosecutions.

B. The *Wheeler* Rule Is Necessary To Ensure The Constitutional Exercise of Peremptory Challenges.

The *Wheeler* rule protects the right of an individual defendant to be free from racial discrimination in the selection of a trial jury, while also preserving intact the efficacy of the peremptory challenge. As Justice Marshall

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[5] The intermediate appellate courts of New York and Illinois also adopted the *Wheeler* rule, but the courts of last resort of those two states subsequently reaffirmed the *Swain* rule, both largely on the basis of *stare decisis*. *People v. Payne*, 106 Ill. App. 3d 1034, 436 N.E.2d 1046 (1982), *rev'd*, 99 Ill. 2d 135, 457 N.E.2d 1202 (1983), *cert. denied*, 105 S. Ct. 447 (1984); *People v. Thompson*, 79 A.D.2d 87, 435 N.Y.S.2d 739 (1981), *overruled by People v. McCray*, 57 N.Y.2d 542, 443 N.E.2d 915 (1982), *cert. denied*, 461 U.S. 961 (1983).

has observed, the *Wheeler* procedure "appears to be quite workable." *McCray v. New York*, 461 U.S. 961, 969 (1983) (Marshall, J., dissenting from denial of certiorari). The accuracy of that observation is confirmed by the experience of those states that have adopted the *Wheeler* rule.

In the seven years since the *Wheeler* rule was adopted, the California Supreme Court has been required to decide only one case tried since the decision in *Wheeler*, involving the use of peremptory challenges to exclude qualified citizens from juries because of group bias.[6] In that case, *People v. Hall*, 35 Cal. 3d 161, 168-69, 672 P.2d 854, 858-59 (1983), the California Supreme Court reversed a criminal conviction because the trial judge had held that a prosecutor's use of peremptory challenges could be deemed unconstitutional only in the rare case in which the prosecutor actually admitted that he had practiced discrimination during jury selection. In *Hall*, the California Attorney General criticized the *Wheeler* rule as unworkable and called for its reversal.[7] The California Supreme Court noted, however, that the state's contention was without foundation in empirical evidence, was based on an improper perception of the *Wheeler* rule, and was belied by the dearth of reported cases raising any issue under *Wheeler*

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[6] In two earlier decisions, the California Supreme Court refused to apply the *Wheeler* rule to juries empaneled before the Supreme Court's decision in that case. *See People v. Mack*, 27 Cal. 3d 145, 611 P.2d 454 (1980); *People v. Allen*, 23 Cal. 3d 286, 590 P.2d 30 (1979). *Accord Reddick v. Commonwealth*, 381 Mass. 398, 409 N.E.2d 764 (1980) (Massachusetts rule applied only prospectively and to cases pending on direct appeal at the time *Soares* was decided).

[7] The California Attorney General claimed that the *Wheeler* rule prohibited the use of peremptories to strike jurors based on "hunches." The California Supreme Court disagreed, observing that a prosecutor may still follow his hunches unless his "hunches" lead only to the exclusion of jurors of a single group affiliation, and even then the prosecution is free to rebut the inference of discrimination (35 Cal. 3d at 169-71, 672 P.2d at 859-60).

in the intervening years (35 Cal. 3d at 169-70, 672 P.2d at 859).

Since its decision in *Hall*, the California Supreme Court has not had occasion to revisit the *Wheeler* question, which indicates that the rule has proved workable in practice. Even more compelling is the fact, as the California Supreme Court noted in *Hall*, that the issue had been raised in only three reported decisions of the California Appellate Court in the five years between the decisions in *Wheeler* and *Hall* (35 Cal. 3d at 170 n.12, 672 P.2d at 859 n.12). The issue has been raised, of course, in several California Appellate Court cases since the California Supreme Court's decision in *Hall*. In all the years since *Wheeler* was decided, however, the California Appellate Court has reversed only one criminal conviction because of a trial court's failure to comply with *Wheeler*. *See People v. Fuller*, 136 Cal. App. 3d 403, 186 Cal. Rptr. 283 (1982).

The experience in Massachusetts has been similar. Although the Supreme Judicial Court and the Massachusetts Appeals Court have both addressed the issue in a number of cases since *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979), only one criminal conviction has ever been reversed because of prosecutorial misuse of peremptory challenges. *See Commonwealth v. Brown*, 11 Mass. App. Ct. 288, 416 N.E.2d 218 (1981).[8]

[8] In one additional case, which had been tried before the Supreme Judicial Court adopted the *Wheeler* rule, the Massachusetts Appeals Court reversed a conviction on this ground, but the Supreme Judicial Court granted further review and reversed that court's decision on the facts of that case. *See Commonwealth v. Gagnon*, 16 Mass. App. Ct. 110, 449 N.E.2d 686 (1983), *rev'd sub nom., Commonwealth v. Bourgeois*, 391 Mass. 869, 465 N.E.2d 1180 (1984).

Since *State v. Crespin*, 94 N.M. 486, 612 P.2d 716 (Ct. App. 1980), the New Mexico courts have revisited the issue only once, in a case in which the Appeals Court found no violation of the New Mexico version of the *Wheeler* rule and affirmed the defendant's conviction. *See State v. Davis*, 99 N.M. 522, 660 P.2d 612 (Ct. App. 1983).

From this experience, one must conclude that the *Wheeler* rule is workable and that it accomplishes its purpose. On the one hand, the prosecutor's discretion in exercising peremptory challenges remains undiminished. On the other hand, the absence of racial discrimination in the trial of cases is assured prior to trial, as it should be, without creating unnecessary issues for resolution on appeal.

The *Wheeler* rule has proved to be workable in practice as a result of its allocation of the burden of proof. Like the *Swain* rule, *Wheeler* presumes that the exercise of peremptory challenges in any particular case is consistent with constitutional requirements. The *Wheeler* rule differs in application from *Swain* only if the defendant satisfies the trial court, based on a timely objection, that the pattern of peremptory challenges creates a *strong likelihood* of discriminatory use. Once the strong likelihood test is satisfied, however, the *Wheeler* rule assures enforcement of constitutional rights for each individual defendant so affected, rather than requiring an accumulation of historical proof of racial discrimination before such enforcement can occur.

As the California Supreme Court found in *People v. Hall*, the *Wheeler* rule has not diminished the currency of the peremptory challenge, which retains a vital role in the California system of criminal justice. While the *Wheeler* rule does require a prosecutor to explain his peremptory challenges when a defendant satisfies the heavy burden of establishing a *prima facie* case, such a

limited incursion into the prosecutor's absolute discretion is necessary to assure protection of individual constitutional rights. Unlike *Swain*, the *Wheeler* rule strikes the proper accommodation between these competing interests.[9]

In analogous areas, this Court has limited the traditionally unfettered discretion of government officials in order to accommodate constitutional rights. For example, this Court has held that non-tenured public employees may not be discharged for constitutionally impermissible reasons, despite the strong tradition of the common law that such employees may be discharged for any reason or no reason at all. *Compare Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 284 (1977), *with Board of Regents v. Roth*, 408 U.S. 564, 578 (1972). Likewise, the broad discretion accorded prosecutors in the initiation and preparation of criminal cases, which this Court recently has described as "particularly ill-suited to judicial review," is nonetheless subject to judicial review if it is " 'deliberately based upon an *unjustifiable standard* such as *race*, religion, or other arbitrary classification.' " *Wayte v. United States*, 105 S. Ct. 1524, 1531 (1985), *quoting Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (emphasis added).

Like the peremptory challenge, the roots of the employment-at-will and prosecutorial discretion doctrines run deep in our legal history. Nonetheless, in order to

[9] Indeed, the *Wheeler* rule, by focusing on the case at bar, rather than on a prior pattern of discrimination, may benefit the prosecutor, who will be afforded an opportunity to explain his use of peremptory challenges. If he gives credible reasons for exercising his peremptory challenges to strike members of a particular racial group, those challenges may still be sustained, even if the state has previously engaged in discrimination. That possibility is foreclosed by *Swain*.

protect the constitutional rights of public employees and criminal defendants, this Court has held that these traditional elements of unreviewable governmental discretion must yield in some small way to accommodate individual constitutional rights. The *Wheeler* rule likewise imposes a reasonable and minimal limitation on the power of prosecutors to use peremptory challenges for racially discriminatory reasons. This Court should adopt the *Wheeler* rule as the least intrusive method for giving effect to the Sixth and Fourteenth Amendment rights which are clearly abridged by the practice of racial discrimination in the use of peremptory challenges.

CONCLUSION

The judgment of the Supreme Court of Kentucky should be reversed and the cause remanded.

Respectfully submitted,

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APPENDIX A

I. Legal Commentary Concerning *Swain* and Alternative Rules

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